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No. 99-261

IN THE
Supreme Court of the United States

WILLIAM MALLORY, *et al.*,
Petitioners,

v.

STATE OF OHIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should consider Petitioners' argument—raised on certiorari for the first time in this case—that the three preconditions set forth in this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), are inapplicable to challenges to the at-large election of state trial and appellate judges?

2. Whether plaintiffs under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, are excused from proving the three *Gingles* preconditions simply by making unsupported allegations of reduced minority participation in the political process as a result of historical discrimination?

LISTING OF ADDITIONAL PARTIES

Petitioners

Hazel L. Bland, Charles W. Cross, Robert Dogan, Donald H. Ellis, Jessie Gooding, Jeffery D. Johnson, Casey C. Jones, C.J. Prentiss, Deborah Stokes-Abraham, Vernon Sykes, and Gladys M. Walcott.

Respondents

Robert A. Taft, Jr., Governor of Ohio, and J. Kenneth Blackwell, Secretary of State of Ohio.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents State of Ohio, Governor Robert A. Taft, Jr., and Secretary of State J. Kenneth Blackwell (collectively, "Respondents"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the United States Court of Appeals for the Sixth Circuit's decision in this case, which decision affirmed the judgment of the United States District Court for the Southern District of Ohio. The district court's and court of appeals' decisions are reported at 38 F.Supp. 2d 525 (S.D.Ohio 1998), and 173 F.3d 377 (6th Cir. 1999), and are reproduced in the appendix to the Petition at 14a and 1a, respectively.

STATEMENT OF THE CASE

Petitioners commenced this Voting Rights Act class action in the United States District Court for the Northern

District of Ohio, Eastern Division, on October 25, 1994. The named plaintiffs/class representatives were twelve (12) African-Americans who resided throughout the State of Ohio ("Petitioners"), five of whom were current or former state legislators, and all twelve of whom were registered Democrats. The defendants were the State of Ohio, and its Governer and Secretary of State, in their official capacities.[1] In their Complaint, Petitioners alleged that the at-large election of judges for twenty (20) trial and intermediate appellate courts in Ohio's eight most-populous counties impermissibly diluted the voting strength of African-Americans in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, Article I, § 2 of the Ohio Constitution, and § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.[2] The district court subsequently certified a plaintiff class consisting of the voting age population of African-Americans entitled to vote and elect judges in each of the twenty challenged courts.

The structure, organization, and territorial jurisdiction of Ohio's state court system is explicitly set forth in Article IV of the Ohio Constitution and Chapters 1901,

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[1] Upon the defendants' motion, the case was subsequently transferred to the United States District Court for the Southern District of Ohio. At the time this case was originally filed, George V. Voinovich was Governor of Ohio and Robert A. Taft, Jr. ("Taft") was Secretary of State of Ohio. On January 11, 1999, prior to the issuance of the court of appeals' decision herein, Taft was sworn in as Governor and J. Kenneth Blackwell ("Blackwell") was sworn in as Secretary of State. Taft and Blackwell have been substituted as Respondents herein. See S. Ct. R. 35, § 3; Fed. R. App. P. 43(c).

[2] The challenged courts included five intermediate appellate court districts, eight county courts of common pleas, six municipal courts, and one county court district. Pursuant to its constitutional discretion, see Ohio Const., Art. IV, § 4(C), the Ohio General Assembly has established probate, domestic relations, juvenile, drug court, environmental, and housing divisions within some of Ohio's common pleas and municipal courts.

1907, 2101, 2153, 2301, and 2501 of the Ohio Revised Code. Pursuant to Article IV, § 6(A), of the Ohio Constitution, the electoral districts of state courts are "linked" to the territorial jurisdictions of the courts, *i.e.*, judges of the various courts are elected by voters who reside within their respective territorial jurisdictions. Moreover, trial court judicial candidates must reside within the territorial jurisdiction of the court to which they seek election. Ohio Const., Art. IV, § 6(B); R.C. 2301.01, 1901.06 and 1907.13. Generally, judicial candidates must be admitted to practice law in the state and must have been engaged in the practice of law for at least six years. R.C. 2501.02, 2301.01, & 1901.06.

Judicial candidates in Ohio run for "numbered posts" —they are candidates for specific judicial seats—which promotes collegiality among judges and avoids voter confusion. Candidates for the courts of appeals and common pleas run in partisan primary elections,[3] but all judicial candidates in Ohio run in the general election on ballots on which judicial candidates' party affiliation does not appear. R.C. 3505.04 & 1901.07(A). Judicial elections are, nonetheless, intensely partisan as the political parties and the judicial candidates themselves routinely communicate the candidates' party affiliations to the voters *via* party sample ballots or slate cards, as well as other campaign literature and media.

As the district court noted, "[t]he basic structure of Ohio's state court system, under which territorial jurisdiction is based solely upon geography, dates to the 1850's when race was not an issue in the structure of state gov-

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[3] Candidates for municipal court are nominated either by nominating petition or by primary election, subject to local municipal charter provisions. See R.C. 1901.07. County court candidates are nominated by petition. R.C. 1907.13.

ernment in Ohio," and is, therefore, "race neutral." 38 F.Supp.2d at 532-33, App. at 22a-23a. Moreover, the qualifications for judicial candidates—age, residency, admission to practice law, and years of practice—and the nominating processes for judicial candidates are all completely race-neutral. 38 F. Supp. 2d at 533-34, App. at 22a-24a.[4]

Prior to trial, Respondents moved the district court for partial summary judgment asserting that Petitioners were unable to establish a *prima facie* case of vote dilution in violation of § 2 of the Voting Rights Act under this Court's decision in *Thornburg v. Gingles,* 478 U.S. 30 (1986), for a number of the challenged courts and *divisions thereof,* and that Petitioners lacked any evidence supporting their constitutional claims.[5] On February 10, 1997, the district court entered summary judgment in favor of the defendants on Petitioners' constitutional claims and further ruled that they had failed to demonstrate that African-Americans could constitute a majority in a hypothetical single-member district for two of the twenty challenged courts. Petitioners did not challenge the district court's summary judgment ruling on appeal.

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[4] Indeed, the district court found that both major political parties in Ohio actively attempted to recruit minority judicial candidates. 38 F. Supp. at 542, App. at 38a.

[5] In their motion, Respondents asserted that, for the purpose of determining whether African-Americans could constitute a majority in a hypothetical single-member district, each *division* of the various trial courts should be treated individually. Petitioners, on the other hand, asserted that the district court "must not treat each division of the common pleas and municipal courts separately in determining whether Plaintiffs . . . satisfied the first *Gingles* precondition." *Mallory v. Ohio,* 38 F. Supp. 2d 525, 570 App. at 88a (S.D. Ohio 1997). The district court found it unnecessary to reach this issue because it determined that the class had failed to satisfy the preconditions for any of the challenged courts even if the various divisions were treated together. *Id.*

The case was tried before the district court in February, 1997, with regard to Petitioners' § 2 claims on the eighteen remaining challenged courts. On October 20, 1997, the district court issued its Findings of Fact and Conclusions of Law in which it rejected Petitioners' claims for the eighteen remaining challenged courts. *Mallory v.* Ohio, *supra.* Judgment was entered accordingly, and Petitioners thereafter timely appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the "carefully written, solidly reasoned, and extremely comprehensive opinion" of the district court. *Mallory v. Ohio,* 173 F.3d 377, 380, App. at 2a (6th Cir. 1999). Petitioners have timely petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

I. INTRODUCTION

In their petition, Petitioners essentially raise two purported "errors" of the courts below: (1) they erred in "mechanically" applying the three preconditions set forth in this Court's decision in *Gingles, supra,* for establishing a *prima facie* case of vote dilution, and (2) they "ignored" the extent to which past discrimination discouraged African-American participation in judicial elections, *i.e.,* the "chilling effect" of past discrimination. In the course of making these arguments, Petitioners have mischaracterized the lower courts' factual findings and misrepresented their arguments in the courts below. Accordingly, this Court should deny the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

II. THE DISTRICT COURT PROPERLY APPLIED THE THREE *GINGLES* PRECONDITIONS TO PETITIONERS' § 2 CLAIMS OF MINORITY VOTE DILUTION IN OHIO JUDICIAL ELECTIONS.

The Voting Rights Act, and in particular § 2, was enacted "to give those who had been disenfranchised on account of their race the opportunity to participate in the political process." *White v. Alabama,* 74 F.3d 1058, 1069 (11th Cir. 1996). "In 1991, [this] Court extended Section 2 to reach state judicial elections," *Cousin v. McWherter,* 46 F.3d 568, 574 (6th Cir. 1995), (citing *Chisom v. Roemer,* 501 U.S. 380 (1991)), and specifically to the election of state trial court judges. *Houston Lawyers' Ass'n v. Attorney General,* 501 U.S. 419 (1991).

> In *Thornburg v. Gingles,* this Court held that Plaintiffs claiming vote dilution through the use of multimember districts must prove three threshold conditions. First, they must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, they must prove that the minority group " 'is politically cohesive.' " Third, the plaintiffs must establish " 'that the white majority votes sufficently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 507 U.S. 146, 157 (1993) (citations omitted). See also *Growe v. Emison,* 507 U.S. 25 (1993).

Both courts below properly premised their rulings, in part, on the Petitioners' failure to satisfy these three preconditions. Nevertheless, Petitioners now challenge the application of these preconditions to cases involving multimember judicial districts. For the following reasons, this Court should reject Petitioners' arguments.

A. Petitioners Did Not Argue to the Courts Below that the *Gingles* Preconditions Should Not Be Applied to Cases Involving Judicial Elections.

For the first time in these proceedings, Petitioners argue in their Petition that the *Gingles* preconditions should not have been applied in cases involving judicial elections. Indeed, Petitioners now assert that this Court should consider the possibility of creating judicial "influence districts." See Petition at 10, 14.[6]

Petitioners never presented this "influence-dilution" argument to the courts below. In fact, the court of appeals expressly noted that:

> [o]n appeal, the class addresses the *Gingles* preconditions only obliquely, preferring instead to focus on a set of related issues. . . . *The class's brief, however, acknowledges that the Gingles preconditions must be satisfied in order for it to prevail.*

173 F.3d at 382, App. at 6a (emphasis added). Petitioners' only argument to the Sixth Circuit with regard to the preconditions was that they had "presented significant evidence as to each of the *Gingles* preconditions for each of the challenged courts. . . ." Appellants' Brief at 29. This Court will not address issues not raised below. *Dothard v. Rawlinson,* 433 U.S. 321, 323 n.1 (1977). Accordingly, Petitioners' belated attempt to evade the requirements of proof under this Court's decisions must fail.

Not once did Petitioners ever request, or even vaguely suggest, that the lower courts should consider the creation

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[6] An "influence district" is one in which members of a minority group do not constitute majority, but in which they "constitute[] an influential *minority*." *Voinovich,* 507 U.S. at 164 (emphasis in original). Petitioners properly observe that this Court has reserved ruling on whether these so-called "influence district" claims are cognizable in challenges to legislative districts under § 2 of the Voting Rights Act. *Id.*

of judicial "influence" districts. If they had, the lower courts would have been correct in refusing to consider the creation of such "influence" districts because doing so would destroy the "linkage" that exists between Ohio courts' territorial jurisdictions and their electoral districts. Linkage "advances the state's substantial interest in judicial effectiveness. Trial judges are elected by a broad range of local citizens, rather than by a narrow constituency. This electoral scheme balances accountability and judicial independence." *League of United Latin Am. Citizens, Council No. 4434 v. Clements,* 999 F.2d 831, 868 (5th Cir. 1993) (*en banc*), *cert. denied,* 510 U.S. 1071 (1994) (*"LULAC"*). Moreover, linkage promotes "the fact and appearance of judicial fairness that are central to the judicial task, in part, by insuring that judges remain accountable to the range of people within their jurisdiction. A broad base diminishes the semblance of bias and favoritism towards the parochial interests of a narrow constituency." *LULAC,* 999 F.2d at 869. See also *Davis v. Chiles,* 139 F.3d 1414, 1421-22 (11th Cir. 1998), *cert. denied,* 119 S.Ct. 1139 (1999); *Milwaukee Branch of the N.A.A.C.P. v. Thompson,* 116 F.3d 1194, 1200-01 (7th Cir. 1997), *cert. denied,* 118 S.Ct. 853 (1998); *Nipper v. Smith,* 39 F.3d 1494, 1543-44 (11th Cir. 1994) (*enbanc*), *cert. denied,* 514 U.S. 1083 (1995).

At trial, all witnesses, Petitioners' witnesses included, testified that judges are not representatives in the sense that they should represent the will of the electors or cater to a particular constituency. See 38 F. Supp. 2d at 534, 577. The creation of subdistricts where certain groups would have more "influence" over the judges elected from those subdistricts would completely destroy the notion embodied in Canon 7 of the Ohio Code of Judicial Conduct that judges should refrain from catering to influence

groups or constituencies.[7] See *Nipper*, 39 F.3d at 1535 ("Engaging in legislative-style 'logrolling' and negotiating would be reprehensible conduct in a judge and would violate the core principles governing the judicial role.") (footnote omitted). Consequently, this Court should reject Petitioners' last-minute endeavor to inject the ill-conceived notion of judicial "influence districts" into this case.

B. The District Court Did Not Limit Its Consideration to Whether Petitioners Had Satisfied the *Gingles* Preconditions.

To support their "influence dilution" argument, Petitioners assert that the "District Court concentrated almost entirely on the three [*Gingles*] preconditions . . . ." Petition at 6. This assertion is demonstrably false.

A cursory review of the district court's decision reveals that it was indeed "comprehensive" as described by the court of appeals. The district court ruled that Petitioners failed to prove *any aspect* of their minority vote dilution claim: (1) Petitioners failed to establish the three *Gingles* preconditions for any of the eighteen challenged courts, (2) even if they had satisfied the preconditions for one or more of the challenged courts, Petitioners had failed to satisfy their ultimate burden of proving, under the "totality of the circumstances," that African-Americans do not have the same "opportunity [as] other members of

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[7] Canon 7, § B(2) provides, in pertinent part:

> (2) A judge or judicial candidate shall not do any of the following:
>
> * * * *
>
> (c) Make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> (d) Make statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court . . . .

the electorate to participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b), and (3) even if they had met their ultimate burden of proving their § 2 claim for any of the challenged courts, Petitioners had failed to proffer an acceptable remedy for such violation.[8] The assertion, therefore, that the trial court focused "almost entirely" on the three *Gingles* preconditions is simply untrue.

C. The Lower Courts Correctly Concluded that Petitioners had Failed to Satisfy the First *Gingles* Precondition for Fourteen of the Eighteen Challenged Courts.

Incredibly, Petitioners argue that the district court's findings with respect the first *Gingles* precondition—numerosity and geographic compactness—are "clearly erroneous" because the court concluded that the Petitioners had satisfied their burden on this issue with respect to some courts, but had not with respect to others. In particular, Petitioners direct this Court's attention to the "conflicting" conclusions regarding the Eighth District Court of Appeals and the Court of Common Pleas for Cuyahoga County—which encompass the same territorial jurisdiction—and the Tenth District Court of Appeals, the Court of Common Pleas for Franklin County, and the Franklin County Municipal Court—which encompass the same territorial jurisdiction.

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[8] Even a quick perusal of the district court's decision reveals the tripartite nature of its ruling. In its Findings of Fact, for example, the court includes subheadings for its discussion of the "*Gingles* Preconditions" and the "Totality of Circumstances" for each county at issue. 38 F. Supp. 2d at 544-67, App. at 43a-83a. In its Conclusions of Law, the court discussed the *Gingles* preconditions, see 38 F. Supp. at 568-72, App. at 85a-93a, the totality of circumstances, see 38 F. Supp. 2d at 572-76, App. at 93a-99a, and the availability of a remedy, see 38 F. Supp. 2d at 576-78, App. at 99a-103a.

Initially, it must be noted that the district court's findings in this regard were mandated by the Petitioners' failure of proof on this issue. The court did not rule that it was impossible to draw a single-member majority-minority district for these courts, but rather that *Petitioners had failed to demonstrate* that such districts could be drawn. See 38 F. Supp. 2d at 529, 545, 549, 578-580, App. at 16a, 43a-44a, 52a, 103a-04a, 106a-08a. Indeed, the only four courts for which the district court found the first *Gingles* precondition satisfied were those for which *Respondents'* expert witnesses conceded at trial that a single-member majority-minority district could be created. See 38 F. Supp. 2d at 545, 549, 553, App. at 43a-44a, 52a, 58a.[9]

Moreover, the district court's conclusions are simply not inconsistent. Rather, the district court's rulings were dictated by the different number of judicial seats on those courts encompassing the same territorial jurisdiction. For example, the Court of Common Pleas for Cuyahoga

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[9] The court of appeals affirmed the district court's ruling on this issue, noting that:

> the only evidence submitted by the class to demonstrate geographical compactness was a set of maps that purported to show the concentration of African-American populations within each of Ohio's largest counties. These maps, however, did not indicate the number of Caucasians within the relevant areas or indicate the relevant census tracts, which is typically needed to draw an electoral district. The class does not dispute the district court's characterization of the maps, nor does it point to further evidence that geographically compact, single-member district[s] could be drawn. In short, while the class offers the bare conclusion that the district court erred, it does not explain how it did so. We therefore find no error in the district court's determination that the class failed to show that goegraphically compact, single-member districts could be drawn in which African-Americans would constitute a majority.

173 F.3d at 383, App. at 7a-8a.

County has 47 judges, while the Eighth District Court of Appeals has only 12 judges. Similarly, the Court of Common Pleas for Franklin County has 22 judges, while the Franklin County Municipal Court and the Tenth District Court of Appeals have only 14 and 8 judges, respectively.[10] Thus, while Respondents' experts conceded that it was possible to create one or more majority-minority districts when creating 47 single-member districts for the Court of Common Pleas for Cuyahoga County, it may not be possible to create a majority-minority district when creating only 12 single-member districts within Cuyahoga County for the Eighth District Court of Appeals. Any "inconsistency" on that issue is solely attributable to Petitioners' failure to submit sufficient evidence to the district court.

D. The Courts Below Properly Found that Petitioners had Failed to Satisfy Their Burden of Proof on the Second and Third *Gingles* Preconditions.

With respect to the final two *Gingles* preconditions—minority cohesion and legally significant white bloc voting—Petitioners asserted in their Petition that the lower courts erred by "ignoring" their non-statistical evidence of racially polarized voting. Specifically, Petitioners asserted that they "presented extensive testimony to establish the

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[10] Petitioners incorrectly advise this Court that the Court of Common Pleas for Franklin County has only 16 judges, only two more than the Franklin County Municipal Court. See Petition at 14. In fact, the Court of Common Pleas for Franklin County has 22 judges, *16 of whom are judges of the court's General Division.* See 38 F.Supp. at 531, App. at 19a. As noted above, however, Petitioners insisted to the district court that the various divisions of the challenged courts be considered together. See n. 5, *supra.* Petitioners cannot legitimately argue, therefore, that the district court, having done as they requested, erred by not treating the various divisions of the Franklin County Court of Common Pleas separately.

existence of racially polarized voting, all of which the District Court dismissed because it was not compiled as statistical data." Petition at 7. Once again, Petitioners have mischaracterized the district court's decision and the nature of the evidence before it.

The district court did not "dismiss" the evidence submitted by Petitioners. Rather, it concluded that the evidence before it was inadequate to satisfy Petitioners' burden on the final two *Gingles* preconditions.

> The purpose of inquiring into the existence of racially polarized voting is two fold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2.

Gingles, 478 U.S. at 56 (citations omitted).

> Both the second and third *Gingles* pre-conditions . . . require a court to consider the voting behavior of different races. However, the inquiry in the second pre-condition differs from that involved in the third: the former asks merely whether voters of the same race tend to vote alike, and the latter evaluates whether "a bloc-voting majority can routinely outvote" the minority, thereby "impair[ing] the ability of a protected class to elect candidates of its choice."

Cousin v. Sundquist, 145 F.3d 818, 823 (6th Cir. 1998) (citations omitted), *cert. denied*, 119 S.Ct. 1026 (1999).

"[T]he question here is not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *LULAC*, 999 F.2d at 850. "[B]loc voting [is] a matter of degree, with a variable legal significance depending on other facts . . . ." *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994) (citation omitted). "[I]n general, a white bloc vote that normally will defeat the combined strength of minority vote support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56.

In the case at bar, Petitioners' evidence on racial bloc voting was generally limited to the anecdotal evidence of several of their witnesses. The district court noted that Petitioners' "witnesses generally testified as to their *belief* that 'blacks tend to vote for blacks and whites tend to vote for whites.'" 38 F. Supp. 2d at 537, App. at 30a (emphasis in original) (citations omitted).

Respondents, on the other hand, submitted the exhaustive statistical analysis of racial bloc voting in each of the counties at issue conducted by Dr. Gary King, the Director of the Harvard/MIT Data Center and "the world's foremost expert in the statistical analysis of racial bloc voting." 38 F. Supp. 2d at 538, App. at 31 (citation omitted). Dr. King considered *every* contested judicial election for the challenged courts during the ten-year period between 1985 and 1995. Based upon that comprehensive data, Dr. King calculated an "average degree of racial bloc voting"[11] for each of the counties at issue.

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[11] The "average degree of racial bloc voting" was calculated as the difference between the average percentage of African-Americans who voted for the Democratic candidate and the average percentage of whites who voted for the Democratic candidate. As noted by Dr. King, there is a degree of racial bloc voting in virtually every election, because, by definition, the only elections in which there is not a degree of racial bloc voting are those elections in which

These "averages" were calculated based upon all of the judicial elections in each county, *i.e.*, those involving a white Democrat versus a white Republican, a white Democrat versus a black Republican, a black Democrat versus a white Republican, and a black Democrat versus a black Republican.[12]

Dr. King's report also demonstrated that the candidate preferred by a majority of African-American voters in each of the counties at issue routinely prevailed and received a significant number, and often a majority, of the votes cast by white voters, or so-called "white cross-over votes." Based upon Dr. King's exhaustive and unrefuted analysis, the court of appeals concluded that the district court had properly rejected Petitioners' unsupported assertion that "blacks usually vote for blacks and whites usually vote for whites" in judicial elections:

> The district court's decision was based on the only testimony presented by either party regarding the actual electoral results in the challenged districts. It was required to make a finding of fact, and it chose to rely on the valid, comprehensive scientific study by Dr. King instead of an unscientific report on

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white and black voters, as groups, vote exactly the same. 38 F. Supp. 2d at 539, App. at 33a. In "classically polarized races," the degree of racial bloc voting "has tended to be 80 percent or more for almost all candidates . . . ." *Clarke v. City of Cincinnati*, 40 F.3d 807, 816 (6th Cir. 1994) (Boggs, J., concurring), *cert. denied*, 514 U.S. 1109 (1995). By contrast, the average degree of racial bloc voting in Ohio's urban counties ranged from 10% in heavily Democratic Mahoning County (Youngstown) to 36% in heavily Republican Franklin County (Columbus), 38 F. Supp. 2d at 546, 550, 553, 556, 559, 562, 565, App. at 46a-47a, 53a, 59a, 64a, 68a-69a, 74a, 80a.

[12] As discussed below, Dr. King also determined that African American judicial candidates can, and frequently do, win judicial elections in Ohio.

> a single judicial district and the subjective experience of several voters.

173 F.3d at 383-84, App. at 9a.

Contrary to Petitioners' assertions, the lower courts did not improperly "dismiss" their "evidence" of racial bloc voting. Rather, the courts below simply concluded that the comprehensive statistical analysis presented by Respondents outweighed Petitioners' anecdotal evidence. Accordingly, this Court should deny the writ of certiorari.

III. THE LOWER COURTS DID NOT IGNORE PETITIONERS' EVIDENCE OF HISTORICAL DISCRIMINATION OR REFUSE TO CONSIDER EVIDENCE OF THE "CHILLING EFFECT" OF THAT PAST DISCRIMINATION.

A. The Lower Courts Did Not Ignore Petitioners' Evidence.

In their final attack on the lower courts' decisions in this case, Petitioners assert those courts improperly "ignored" evidence that potential African-American judicial candidates were discouraged from running by a "history of discrimination." Petition at 16-18. Petitioners argue, in essence, that the lower courts should have excused their failure to prove any other element of their case simply because they presented evidence of "pervasive past discrimination against African-Americans in such areas of housing, education, employment, and health . . . ." Petition at 16. This past discrimination, Petitioners maintain, has resulted in a " 'chilling effect' that discourages African-Americans from running for judicial office because of the widespread perception that they cannot win." Petition at 17. This assertion is without any basis in the record before the district court.

Initially, it must be noted that African-American judicial candidates in Ohio can, and routinely do, win. As

found by the district court, from 1985 to 1995, in the counties at issue, black candidates had a remarkable success rate, winning 72.3% of the primary election races (60 of 83), and 57.4% of the general election races (66 of 115) involving at least one African-American candidate.[13] 38 F. Supp. 2d at 543, App. at 40a-41a.[14] Compare *Milwaukee Branch of the N.A.A.C.P.*, 116 F.3d at 1198 (no § 2 violation where black candidates won five of six primaries, six uncontested general elections, and two of ten contested general elections for at-large, county-wide judicial office).[15]

These actual election results, as well as his detailed statistical analysis, led Dr. King to a rather unremarkable conclusion: that African American judicial candidates, like white candidates, tend to win when they run as a candidate for the majority political party in the county. Thus, black Republicans usually win in heavily Republican Franklin and Hamilton Counties, while black Democrats tend to win in heavily Democratic Cuyahoga County.

Furthermore, when assessed in light of the number of minority group members eligible to run for and hold

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[13] These numbers, in and of themselves, belie Petitioners' assertion that there have been "few" African-American judicial candidates in the counties at issue. Petition at 17.

[14] The district court's findings incorrectly indicate that African-American judicial candidates had won 80 of 123 primary races. In making its finding, the district court relied upon Defendants' Exhibit 15, as corrected during trial, and that exhibit accurately indicates that African-Americans won 60 of 83 primary races. During trial, Petitioners stipulated to the accuracy of Defendants' Exhibit 15, as corrected during trial. 38 F. Supp. 2d at 530, App. at 17a.

[15] In detailed, county-by-county findings, the district court herein discussed a number of successful and unsuccessful African-American judicial candidates. 38 F. Supp. 2d at 544-67, App. at 43a-83a.

judicial office, see *Cousin v. Sundquist,* 145 F.3d at 833; *LULAC,* 999 F.2d at 865-67, 893; *Milwaukee Branch of the N.A.A.C.P.,* 116 F.3d at 1200, the district court properly noted that black lawyers are more likely than their white counterparts to be elected to judicial office in Ohio. Simply put, African-American judges constituted a greater percentage of the benches than African-American lawyers constituted a percentage of the bars in virtually all of Ohio's most-populous counties.

Thus, the district court did not "ignore" the testimony offered by Plaintiffs' witnesses concerning any so-called "chilling effect." Rather, it is clear from the record that such testimony was unsupported and not credible. Blacks can and do win judicial elections in each of the counties at issue.

Nor did Petitioners offer an explanation for their bare assertion that African-Americans were hesitant to run for judicial office because of the effects of past societal discrimination. The fact that some black candidates are hesitant to run for judicial office is of little significance. Running for judicial office, and indeed running for any office, requires the expenditure of a great deal of time and resources. Republicans, black and white, are particularly hesitant to run in Cuyahoga County. Democrats, black and white, are particularly hesitant to run in Franklin or Hamilton Counties. See *Cousin v. Sundquist,* 145 F.3d at 833 ("That political success is difficult, however, does not mean it is unmanageable . . . ."). The sparse testimony concerning the "chilling effect," *i.e.,* that black lawyers do not run for judicial office because they cannot win on account of their race, is not borne out by the evidence and, in any event, does not give rise to a violation of § 2 of the Voting Rights Act.

B. The Court of Appeals' Decision Does Not Conflict With the Decisions of Two Other Circuits.

In one last desperate attempt to convince this Court that this case warrants its review, Petitioners assert that the decision below conflicts with the decisions of the Fifth and Eleventh Circuits which have "endorsed 'the proposition that district courts should consider the possibility that African-Americans do not run because they cannot win.'" Petition at 9-10 (quoting *Mallory v. Ohio*, 173 F.3d at 385, App. at 11a) (citations omitted). This assertion is false, and must be rejected by this Court.

Initially, it must be noted that the courts below rejected the notion that African-American judicial candidates could not win in Ohio. As stated by the court of appeals:

> But even if this circuit were to adopt such an approach, it would only apply in a case where there was evidence that African-Americans could not win. *Here, the evidence shows exactly the opposite.*

173 F.3d at 385, App. at 11a (emphasis added). The Sixth Circuit never rejected Petitioners' argument—that § 2 plaintiffs are excused from proving the three *Gingles* preconditions when they introduce evidence of a "chilling effect"—because it concluded that the record did not support Petitioners' assertion of a "chilling effect" in Ohio judicial elections. Consequently, the decision below cannot be considered to be in conflict with the decisions of any other circuits on this issue.

Moreover, even if this Court were to read the decision below as suggested by Plaintiffs, *i.e.*, as rejecting the argument that a proven "chilling effect" otherwise excuses § 2 plaintiffs from their burden of proof under *Gingles*, that decision conflicts with no present decision of the Fifth or Eleventh Circuits. The Eleventh Circuit decision

cited by Petitioners, *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993), was vacated and replaced by the Circuit's *en banc* decision reported at 39 F.3d 1494.

Moreover, the two Fifth Circuit decisions cited by Petitioners, *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989), and *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984), both predate that Circuit's *en banc* decision in *LULAC, supra*. In *LULAC*, the *en banc* Fifth Circuit expressly stated:

> Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute among the parties. Nor has anyone questioned plaintiffs' assertion that disparities between white and minority residents in several socioeconomic categories are the tragic legacies of the State's discriminatory practices. Defendants do argue, however, that these factors, by themselves, are insufficient to support the district court's "finding" that minorities do not enjoy equal access to the political process *absent some indication that these effects of past discrimination actually hamper the ability of minorities to participate*. We again agree.
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> * * * *
>
> Plaintiffs have offered no evidence of reduced levels of black voter registration, lower turnout among black voters, or any other factor tending to show that past discrimination has affected their ability to participate in the political process.

LULAC, 999 F.2d at 866-67 (emphasis added).

As noted above, the Sixth Circuit in this case did not "ignore" Petitioners' evidence of past discrimination. Rather, the court of appeals held that the record in this case "shows exactly the opposite" of Petitioners' claims

of reduced African-American participation in the political process. The finding is entirely consistent with the holdings of the Fifth and Eleventh Circuits in *LULAC* and *Nipper*. Consequently, even if the Sixth Circuit's decision below were read as suggested by Petitioners, it creates no conflict among the circuits. The petition for a writ of certiorari should, therefore, be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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